JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 270

CECIL W. ARMSTRONG, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Claims

REPLY BRIEF FOR THE PETITIONERS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I. Regardless of the Type of Title the Government Received, It Was Subject to the Liens of the Petitioners

The decision below was bottomed on the erroneous premise that the clause of the Rice contract giving the Government the option, in the event of a termination for default, to acquire title to manufacturing materials (Clause 11(d), R. 42), gave the Government "inchoate title" to these materials; further, this "inchoate title" prevented the petitioners from acquiring statutory

liens on the uncompleted vessels and materials (R. 24). The Government has diluted the reference of the court below to "inchoate title" by suggesting that "this characterization of the Government's interest in the property means nothing more than that the petitioners' interest in the materials was always subject to the right of the United States to exercise its contractual right to call for the transfer of title upon termination for default." (Br. for U.S., p. 19, fn. 13). Thus the Government concedes, in effect, that it did not have title but merely an option to acquire title. The Government glosses over the fact that the petitioners could and did acquire liens during the period of time that the title to the uncompleted boats and materials was in Rice, by asserting that, in effect, any lien rights acquired by the petitioners were of no consequence since the Government later acquired "absolute" title from Rice.[1]

[1] In a marginal note, the Government's brief (fn. 5, p. 11) raises for the first time questions of whether, under Maine law, the petitioners had valid liens. The decision below was rendered on cross-motions for summary judgment and the court below remarked that the parties were in "substantial agreement . . . as to the circumstances giving rise to plaintiff's claim" (R. 18). The contracts between petitioners and Rice were "sales whereby Rice, located in Maine, ordered materials shipped to its plant in Maine for use on the contract to supply boats to the Government."

It is to be noted that under the Maine statute, the petitioners had four days after launching of the boats, or four days after the contract was completed, to enforce their attachment. See Ch. 2, Chap. 178, Rev. Stat. of Maine, 1954 (Br. for Pet., p. 2). Termination of the Rice contract was on August 2, 1955 and the Instrument of Transfer of Title was executed on August 4, 1955 (R. 17, 51). The petitioners' position is similar to that of the lien claimants under the similar New Hampshire statute in *In re Mt. Washington S. S. Co.*, 43 F. Supp. 176, 179 (D.N.H.), who were unable to perfect their liens because bankruptcy intervened before the time for filing an attachment had expired. In that case the lien claimants were given the right to prove their claims and liens in the bankruptcy proceedings.

The Government contends that there should be no distinction drawn as to applicability of liens created by state laws whether the Government acquires title under a title-vesting type of progress payment clause or under the Default clause. The title-vesting type of progress payment clause operates immediately whereas the Default clause could be utilized only on the condition that the contractor was in default and further required the exercise of two options by the Government: first to terminate for default, and second to "require" the contractor to transfer title to the Government (Cl. 11(d), R. 42). The availability to the Government of these two options, provided the contractor was in default, could hardly cut off the rights of lien creditors which arose prior to the exercise by the Government of its options. The impracticability and the repercussions of this position have been discussed in petitioners' main brief (pp. 22-25) in connection with the subject of "inchoate title". The Government's argument is purely academic for it ignores the fact that in the instant case the Government restricted its security for the progress payments it made to a lien in its favor (R. 36) and that it recognized that other liens might be acquired against the property by inserting a Discharge of Liens clause (R. 37).

Our position as to title being in the contractor at all times prior to the execution of the "Instrument of Transfer of Title" is supported by the case of *Thomson Machine Works Co. v. Lake Tahoe Marine Supply Co.*, 135 F. Supp. 913, 915 (N.D. Calif.), cited by the Government. That case involved a contract similar to the Rice contract, and like Rice, Tahoe executed a transfer of title to the Government after termination for default. The Court said:

> There is no question but that title to the propeller shafts was always in Tahoe. When Tahoe transferred title to the government, title as to the vessel and to materials vested in the government.

The argument that the Government, under petitioners' theory, had an open-end liability for "unsatisfied materialmen's claims" (Br. for U.S., p. 18) is without merit. The Government had the right under the Discharge of Liens clause (R. 37) to discharge liens at the expense of the contractor, if the contractor had failed to do so. The Government retained a percentage of the contract price until final acceptance of all work (Progress Payments and Liens clause, (a), R. 35), so that it had some contract funds with which to pay liens. Further, since final acceptance of the work could not take place until six months after delivery of the boats to the Government (R. 32, 36), the holders of any liens would have to assert their claims long prior to the disbursement to the contractor of the retained funds. Finally, the Government could, if it wished, resort to foreclosure proceedings and rely on its paramount lien to protect its position.[3]

The Government's argument fails to come to grips with the basic issue raised in the first point of petitioner's brief (p. 10, *et seq.*). The title to the uncompleted boats and materials was in Rice at all times prior to the execution of the "Instrument of Transfer of Title"

[3] Thompson had sought to enforce his lien on the materials and title vested in the Government, he did not seek just compensation.

[4] H. Rep. No. 39, 62nd Cong., 1st Sess., p. 3, cited by the Government, which recommended adoption of the paramount lien statute (Act of August 22, 1911, 37 Stat. 32, 34 U.S.C. 582), based upon an opinion of the Attorney General expressly recognizing that liens might be acquired by materialmen and suppliers on boats being constructed for the Navy.

and the Government in its reply brief herein, has not taken a contrary position. During the period title was in Rice the petitioners acquired valid liens upon the materials and boats and these liens were an encumbrance upon the uncompleted boats and materials when the Government acquired title thereto.

II. The Government's Lien Was Merged in Its Title When It Acquired Title

The Government argues that its paramount lien should not be considered merged in its title for equitable reasons (Br. for U.S., pp. 29-31). The doctrine of merger was discussed in petitioners' brief (p. 30). While there may be instances when equity will decree that the acquisition by a lien holder of the title will not result in the merger of the inferior interest in the superior interest, the Government has failed to show any equitable considerations which should give rise to this "excepted" doctrine.[1] If the property were still subject to a foreclosure sale, there might be some basis for contending that the Government's lien was not merged. But where the Government has "cloaked" the property with its sovereign mantle, its contention that its lien was not merged in what it terms "absolute" title is without merit.

With regard to the equities which the Government claims in the property it acquired from Rice, the debt which Rice is alleged to owe to the Government resulted from work performed by the Government after

[1] An examination of the "supporting" authorities cited by the Government (Br. for U.S., p. 29) shows that two of the three texts [illegible] and both of the cases were concerned with the mergers of [illegible] not with liens. The third text, Pomeroy's Equity Jurisprudence (5th ed., Sec. 791), is concerned only with general equitable principles.

it acquired title to and possession of the property.[1] In no way is the alleged indebtedness pertinent to the issues herein. The obligation of the Government to the petitioners accrued when the Government acquired title.

III. The Destruction of the Petitioners' Liens by the Government Constituted a Taking in the Constitutional Sense

It has long been recognized that the lien of a supplier, laborer or a mechanic upon a building or a vessel is predicated upon the sound ground that having enhanced the value of the structure or the vessel, the laborer, supplier or materialman is entitled to priority of payment for the value of the work performed or the material suplied. See *Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U.S. 128, 136.

As made clear by the Court's decision in *United States v. Munsey Trust Co.*, 332 U.S. 234, 244 (cited by the Government), the statutory provisions which require a contractor to furnish a payment bond, were designed to protect laborers and materialmen in order to place the risk of their payment upon a surety rather than the Government. But in the instant case, the Government made no provisions for bonds to secure the payment of the petitioners.

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[1] The Government claims Rice owes it $146,479.28 for excess costs. This sum allegedly results principally from completion costs, solely for construction, of $166,627.34 (R. 11-12). Rice had a contract price of $175,900 and, based upon partial payments received, the contract was 82% complete (R. 53). The completion costs ranged from 71.16% to 100% of completion (R. 57). Four months prior to termination Rice had spent $108,335.23 (R. 58). Thus it would appear that to complete the remaining 18% of the work the Government spent about 85% as much as Rice had spent to perform 82% of the work.

Rice is a bankrupt and there are no assets in the estate, nor will any become available to pay the petitioners for the materials and supplies they furnished to Rice for use on the subject boats (R. 17). The liens which were acquired by the petitioners under the Maine statute for the value of the materials and supplies they furnished for the the subject boats was the only means they had to obtain payment.

While the Government apparently contends it had no notice of the liens of the petitioners (Br. for U.S., p. 28), in his letter of August 2, 1955 terminating the contract, the Contracting Officer took the position that Rice had stopped work on March 25, 1955 and had not thereafter resumed (R. 48). At the time the Government was considering whether it would require Rice to transfer title, it could have made inquiry as to nature and extent of the encumbrances upon Rice's title. At that point, the Government had its option to decide whether it should foreclose its paramount lien or whether it should acquire Rice's title with its encumbrances. The Government having elected to acquire Rice's title with its encumbrances, it should not now complain that it is being asked to pay the encumbrances which it has assumed as an incident to its acquisition of Rice's title.

It has been said that it is not necessary to establish the awareness of the Government that its acts might result in a taking in order for the courts to have jurisdiction in a suit for just compensation. *Cotton Land Co.* v. *United States*, 109 C. Cls. 816, 831-2. See also *International Paper Co.* v. *United States*, 282 U.S. 399, 407. The issue of lack of notice of liens has not been previously raised in these proceedings. However, since the Government claims this feature distinguishes the case of *Thibodo* v. *United States*, 187 F. 2d 249, 256

(C.A. 9), we must observe that the quotation from that case in footnote 19 (Br. for U.S., p. 28) is followed by the following language of the court:

> The holding of the trial court to the effect that *the record* did not impart actual or constructive notice to the condemnor leaves unanswered the question of whether the condemnor had actual notice of the appellant's interests. The trial on the merits may reveal this important circumstance.

Actually the Government knew Rice was defaulting because it had exhausted its funds and was not able to pay its creditors (R. 48).

The Government's reliance upon *United States* v. *John K. & Catherine S. Mullen Benev. Corp.*, 63 F. 2d 48 (C.A. 9) affirmed sub. nom. *Mullen Benev. Corp.* v. *United States*, 290 U.S. 89, is misplaced. In the Circuit Court, the decision had turned on the point that the plaintiff did not have a lien on the property at the time the Government acquired title to the property and this Court affirmed that decision solely on that ground. The Circuit Court had also stated that the disability of the plaintiff to enforce its lien did not constitute a taking under the Fifth Amendment. This statement, however, particularly in view of this Court's decision affirming, was unnecessary to the result reached. The same Circuit Court in the later case of *Thibodo* v. *United States*, 187 F. 2d 249 (C.A. 9), reached a contrary result to its dictum in the *Mullen* case by holding that where no provision was made for payment of the lien on property taken by the Government, the lien holder was entitled to sue for just compensation. While the Government attempts to distinguish the *Thibodo* case, the principle that the lien was rendered unenforceable by the Government's taking of the fee

and that this gave rise to just compensation is the crux of the decision.

The argument that the subject taking was consequential or incidental is not sustained by the facts herein. The Government, quoting this Court, has pointed out that frustration and appropriation are essentially different things (Br. for U.S. p. 23), and with this concept we have no dispute. However, it is not correct to say that any taking of a property right which may be the unintentional result of lawful governmental action, is consequential and therefore, not compensable. For example, in *United States* v. *Causby*, 328 U.S. 256, 262, the fact that aircraft approaching an airfield flew low over the Causby property was held to be a "taking", even though the Government contended "there was merely incidental damage occurring as a consequence of authorized air navigation." (p. 260). In *International Paper Co.* v. *United States*, *supra*, there was also held to be a taking, despite the fact that the loss of use by the Paper Company of the waters of the Niagara River was incidental to the Government's lawful requisition from a power company of all water power from the river.

In the instant case, there was specific property taken, that is the petitioners' liens. The taking was more than a mere deprivation of a hope or expectation of business advantage or opportunity as in *Mitchell* v. *United States*, 267 U.S. 341; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266; or *Omnia Co.* v. *United States*, 261 U.S. 502, all cited by the Government. The liens were the sole means by which the petitioners could be assured of the payment of the money due to them. The taking by the Government was a direct appropriation of this security, for which the

petitioners are entitled to just compensation. As this Court remarked in *United States* v. *Dickinson*, 331 U.S. 745, 748:

> The Constitution is "intended to preserve practical and substantial rights, not to maintain theories". * * *
>
> * * * The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure . . . .

The petitioners herein have been deprived by the sovereign of the right to enforce their liens and in this sense the liens were taken from them. Their sole remedy is their right to just compensation.

Respectfully submitted,

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Dated, March 3, 1960

SUPREME COURT OF THE UNITED STATES

No. 270. October Term, 1959.

Cecil W. Armstrong, et al., Petitioners, v. United States of America.	On Writ of Certiorari to the United States Court of Claims.

[June 27, 1960.]

Mr. Justice Black delivered the opinion of the Court.

In this action petitioners assert materialmen's liens under state law for materials furnished to a prime contractor building boats for the United States, and seek just compensation under the Fifth Amendment for the value of their liens on accumulated materials and uncompleted work which have been conveyed to the United States.

The United States entered into a contract with the Rice Shipbuilding Corporation for the construction of 11 navy personnel boats. The contract provided that in the event of default by Rice, the Government could terminate the contract and require Rice to transfer title and deliver to the Government all completed and uncompleted work together with all manufacturing materials acquired by Rice for building the boats. Petitioners furnished various materials to Rice for use in construction of the boats. Upon Rice's default, the Government exercised its option as to 10 of the boat hulls still under construction; Rice executed an itemized "Instrument of Transfer of Title" conveying to the United States the hulls and all manufacturing materials then on hand; and the Government removed all of these properties to out-of-state naval shipyards for use in the completion of the boats. When the transfer occurred, petitioners had not been paid for their materials and they have not been paid since. Petitioners therefore contended that they had liens under Maine law

which provides that "[w]hoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched . . . . He also has a lien on the materials furnished before they become part of the vessel which may be enforced by attachment . . . ." Maine Rev. Stat., 1954, c. 178, § 13.

Claiming valid liens on the hulls and manufacturing materials at the time they were transferred by Rice to the United States, petitioners asserted that the Government's action destroyed their liens by making them unenforceable and that this constituted a taking of their property without just compensation in violation of the Fifth Amendment.[1] The Court of Claims, relying on *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452, held that petitioners never acquired valid liens on the hulls or the materials transferred to the Government and that therefore there had been no taking of any property owned by them. 169 F. Supp. 259. We granted certiorari. 361 U. S. 812.

I.

The Court of Claims reached its conclusion from the correct premise that laborers and materialmen can acquire no liens on a "public work." *Hill* v. *American Surety Co.*, 200 U. S. 197, 203; *Equitable Surety Co.* v. *McMillan*, 234 U. S. 448, 455; *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 241. It reasoned that because the contract between Rice and the United States contemplated that title to the vessels would eventually vest in the Government, the Government had "inchoate title" to the materials supplied by petitioners, rendering such materials "public works" immune from the outset to petitioners'

[1] The relevant portion of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."

liens. We cannot agree that a mere prospect that property will later be owned by the United States renders that property immune from otherwise valid liens.

The sovereign's immunity against materialmen's liens has never been extended beyond property actually owned by it. The *Ansonia* case itself, upon which the Court of Claims relied, makes this clear, where in dealing with one aspect of the issues there involved, the Court said:

> "We are not now dealing with the right of a State to provide for such liens while property to the chattel in process of construction remains in the builder, who may be constructing the same with a view to transferring title therein to the United States upon its acceptance under a contract with the Government. We are now treating of property which the United States owns. Such property, for the most obvious reasons of public policy, cannot be seized by authority of another sovereignty, against the consent of the Government." 218 U. S., at 471.

The terms of the contract between Rice and the United States show conclusively that Rice, not the United States, had title to the property when petitioners furnished their materials. The agreement provided for delivery, preliminary acceptance, and final acceptance of the boats, the contractor to remain responsible for all supplies until delivery. The contractor was required to insure the property for the Government's benefit only to the extent of progress payments made and materials furnished by the Government. The very clause here invoked by the Government provided that upon default and termination of the contract the Government might "require the Contractor to *transfer* title and *deliver*" the work, supplies and materials on hand. (Emphasis added.) While the Government was obliged to make progress payments based on the percentage of the work completed, nothing

in the contract provided that ownership of the portions of the work paid for should vest in the United States. On the contrary, it was stipulated that all progress payments should be secured by a paramount government lien on the property. And finally, the contractor was required to discharge immediately any lien or right *in rem* asserted against the property. In their totality, these provisions clearly recognize that title was to remain in Rice during performance of the work, and show that private liens could attach to the property while Rice owned it.

We think, therefore, that the Court of Claims was in error in holding as it did. This, however, does not end the case in petitioners' favor since the United States urges other grounds to support its judgment.

II.

It is contended that petitioners' asserted liens gave them no compensable property interests within the meaning of the Fifth Amendment. Under Maine law, materialmen become entitled to a lien when they furnish supplies; however, the lien must subsequently be enforced by attachment of the vessel or supplies. There is no allegation that any of the petitioners had taken steps to attach the uncompleted work. Nevertheless, they were entitled to resort to the specific property for the satisfaction of their claims. That such a right is compensable by virtue of the Fifth Amendment was decided in *Louisville Bank* v. *Radford*, 295 U. S. 555. In that case, a bank acquired a mortgage which under state law constituted a lien enforceable only by suit to foreclose. Subsequently, Congress amended the Bankruptcy Act so as to deprive mortgagees of substantial incidents of their rights to resort to mortgaged property. This Court held that the bank's property had been taken without just compensation in violation of the Fifth Amendment. No reason has been

suggested why the nature of the liens held by petitioners should be regarded as any different, for this purpose, from the interest of the bank held compensable in the *Radford* case.

The Government, however, suggests that because it held a paramount lien on the property to secure its progress payments, petitioners' claimed liens were in fact worthless. Petitioners, on the other hand, argue that when the Government chose to acquire title to the property rather than to enforce its lien, the lien merged with the title, thus making petitioners' liens paramount, and that even if it did not, and their liens remained subordinate to that of the Government, the value of the hulls and materials would have been sufficient to satisfy the Government's claims and some or all of petitioners' claims as well.

We need not decide whether, as a matter of law, the Government's lien "merged" in its title. At the very least, petitioners, prior to the transfer of title, had the right to whatever proceeds the property might bring over and above the Government's claim to the amount of its progress payments.[4] By the date of default, Rice had expended some $198,000, while the Government had advanced only about $141,000 in progress payments. We have no way of knowing what the property would have brought had it been sold, but it cannot be said with certainty that it would have brought no more than the amount of the Government's claim. Moreover, petitioners themselves might have been able to purchase the property and realize some amount on their claims after the Government's claims had been satisfied. While these

[4] While Rice was also liable to the Government for an additional amount approximating $140,000 representing the excess cost to the Government of having the boats completed, the contract does not provide, and there is no allegation, that this amount was secured by a lien on the property.

factors may present a difficult problem of valuation, we cannot say on this record that petitioners' interests were valueless.

The Government also seems to suggest that because the contract between Rice and the United States expressly gave the Government the option of requiring a conveyance of title upon default, petitioners' liens attached subject to that limitation. Petitioners, however, were not parties to the contract. Furthermore, their liens attached by operation of law and nothing in the record indicates that the scope of such liens is affected by contractual arrangements into which the owner of the property may have entered.

We conclude, therefore, that on this record petitioners must be considered to have had compensable property interests within the meaning of the Fifth Amendment prior to transfer of title to the Government.

III

The final question is whether the Government's action constituted a "taking" of petitioners' property interests within the meaning of the Fifth Amendment. Before the United States compelled Rice to transfer the hulls and all materials held for future use in building the boats, petitioners had valid liens under Maine law against both the hulls and whatever unused materials which petitioners had furnished. Before transfer these liens were enforceable by attachment against both the hulls and all materials. After transfer to the United States the liens were still valid. *United States v. Alabama*, 313 U. S. 274, 281–282, but they could not be enforced because of the sov-

Questions of value of the liens were not determined by the Court of Claims since it entered a summary judgment for the United States for reasons stated on p. — *supra*.

cient immunity of the Government and its property from suit.[1] The result of this was a destruction of all petitioners' property rights under their liens, although as we have pointed out, the liens were valid and had compensable value. Petitioners contend that destruction of their liens under the circumstances here is a "taking." The United States denies this, largely on the premise that inability of petitioners to enforce their liens because of immunity of the Government and its property from suit cannot amount to a "taking."

The Government argues that the *Aerovox* case is dispositive of this Fifth Amendment issue. In that case the contract between the shipbuilder and the United States provided, as to one of the ships contracted for, the dredge *Bonnard*, that as progress payments were made the portion of the work paid for should become the property of the United States. Subcontractors claimed liens on the uncompleted vessel under the Virginia supply-lien law. This Court merely held that, as the property had [passed] to the United States by virtue of the terms of the contract, no lien could be enforced against it. No question was raised as to the rights possessed by the subcontractors prior to the acquisition of title by the United States nor as to whether that event entitled them to just compensation under the Fifth Amendment. There is, to be sure, reason to believe that the subcontractors' liens in that case, like those of petitioners here, did attach as soon as materials were furnished, which would necessarily be prior to the making of a progress payment for the portion of the work incorporating those materials and the conse-

[1] *United States v. Aerovox Rubber Co.*, 218 U. S. 452; *Hollerman Surety Co.*, 200 U. S. 197; *Equitable Surety Co. v. McMillan*, 234 U. S. 448; *United States v. Massey*, 237 U. S. 234; *The Siren*, 7 Wall. 152; *Minnesota v. United States*, 305 U. S. 382; *United States v. Alabama*, 313 U. S. 274.

quent passage of title to the United States. See *Hayes & Co. v. Trigg Co.*, 110 Va. 165, 185–186, 199. But the Fifth Amendment question was not raised or passed upon. In these circumstances we cannot regard the court's decision as dispositive on the precise point now under consideration, and must proceed to decide that question.

We hold that there was a taking of these liens for which just compensation is due under the Fifth Amendment. It is true that not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense. *Omnia Commercial Co. v. United States*, 261 U. S. 502, 508, 510. This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable "takings" and what destructions are "consequential" and therefore not compensable. See, *e. g.*, *United States v. Central Eureka Mining Co.*, 357 U. S. 155; *United States v. Causby*, 328 U. S. 256; *United States v. General Motors*, 323 U. S. 373; *United States v. Spangler*, 308 U. S. 256; *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393; *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467; *Legal Tender Cases*, 12 Wall. 457, 551.

The total destruction by the Government of all value of these liens, which constituted compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because

The Government also cites *Walla Walla Co. v. United States*, 299 U. S. 83. The court there, however, recognized that the Government's action could not have destroyed any liens existing at the time the Government acquired the land because, as the court said, None remained upon the land which the purchaser contemplated." 299 U. S., at 95.

their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. Neither the lienholders' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here. Cf. *Thibodo v. United States*, 187 F. 2d 249.

The judgment is reversed and the cause is remanded to the Court of Claims for further proceedings to determine the value of the property taken.

Reversed and remanded.

MR. JUSTICE STEWART concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 270.—October Term, 1959.

Cecil W. Armstrong, et al., Petitioners, v. United States of America.	On Writ of Certiorari to the United States Court of Claims.

[June 27, 1960.]

Mr. Justice Harlan, whom Mr. Justice Frankfurter and Mr. Justice Clark join, dissenting.

I agree that petitioners had valid liens on the uncompleted work and supplies at the time the property was transferred to the Government, and that such liens represented compensable property interests within the meaning of the Fifth Amendment. But the Fifth Amendment renders the Government liable only if there was a "taking" by it of such interests. I cannot conclude, as the Court so readily does, that simply because the value of those liens was "destroyed" there was a "taking" of petitioners' property.

As the Court concedes, not every governmental act which ultimately destroys property rights constitutes a compensable taking of those rights. We are not here dealing with a situation in which the United States has condemned the full fee interest in property, thus purporting to extinguish all claims therein. In such a case, it may well be that lienholders are entitled to compensation for the value of their interests. *See Thibodo v. United States*, 187 F. 2d 249; cf. *United States v. General Motors Corp.*, 323 U. S. 373, 377–378. In this instance, however, the Government has not exercised its power of eminent domain with the intent and purpose of extinguishing petitioners' liens; indeed it has not exercised its power of eminent domain at all. All it has done

is to exercise its undoubted power to contract and to acquire title to the property, the consequent effect of which is to render the liens unenforceable because of the independent principle of sovereign immunity. The very nature of the doctrine of sovereign immunity precludes regarding its interposition as a Fifth Amendment "taking." It seems to me that a Court which, having established this immunity, then declares that the Government must pay for exercising it, is effectively negativing it.

I would affirm.